87-203

No. .

Supreme Court, U.S.
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In the
Supreme Court of the United States.

OCTOBER TERM, 1986.

THEODORE E. HARVEY,
PETITIONER,

v.

RICHARD A. SUBATCH,
RESPONDENT.

ON A PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

PETITION FOR WRIT OF CERTIORARI.

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Question Presented.

Whether the closing argument of counsel for the plaintiff in a civil rights action was prejudicial in invoking the imagery, violence, and lawless conduct of police inspector "Dirty Harry" Callahan, a Clint Eastwood film character, as suggestive of the character and conduct of the defendant, a Massachusetts State Police Trooper, in the alleged beating of the plaintiff; and in arguing that a State Police internal investigation had found misconduct by the defendant, where there was no evidence of such finding, where plaintiff's counsel had been specifically instructed not to make such argument, and where plaintiff's counsel had given his assurance to the court that he would not, so as to constitute a denial of due process of law, or to justify this Court's exercise of its broad supervisory power over the Federal courts?

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Citation to Opinion Below.

The opinion of the United States Court of Appeals for the First Circuit is unpublished and reproduced in the Appendix hereto (App. 5a).

Jurisdiction.

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Constitutional Provisions and Statutes.

UNITED STATES CONSTITUTION.

Amendment 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Statement of the Case.

On October 21, 1980 the plaintiff Richard A. Subatch filed a complaint against the petitioner Theodore E. Harvey, a Massachusetts State Police Trooper, and co-defendants, Albert Balestra, also a Massachusetts State Police Trooper, and Stephen Begley, an officer of the Police Department of the City of Peabody, Massachusetts, alleging illegal detention and beating under 41 U.S.C. § 1983, and under state false imprison-

ment and battery law, and claiming intentional infliction of emotional distress under state law. As more fully detailed in the Statement of Facts, the violations were alleged to have occurred during two separate, but related incidents, the first when the plaintiff had to be forcibly removed from his motor vehicle after having been stopped by Trooper Harvey for violation of Massachusetts law relating to the display of vehicle number plates; the second at a state police barracks where the plaintiff was taken as a person incapacitated by reason of the consumption of intoxicating liquor. The plaintiff claimed that his head was kicked to the floor by the petitioner at the barracks.

Trial before Zobel, D.J. (Mass.), and a jury commenced on August 27, 1985. On September 4, 1985, the jury returned with a verdict for the plaintiff in the amount of $500,000 compensatory damages and $10,000 punitive against the petitioner Harvey. The jury found the co-defendants Balestra and Begley not liable. Judgment in the said amounts were entered by Zobel, J., on September 10, 1985 (App. 1a).[1]

The petitioner Harvey filed timely motions for new trial and for remittitur maintaining that the closing argument of plaintiff's counsel was prejudicial. The trial judge entered a Memorandum of Decision denying Trooper Harvey's motion for new trial as to liability, but ordered a new trial as to damages unless the plaintiff accepted remittitur of the amount in excess of $75,000 (App. 2a-4a). The court found that "$250,000 for . . . mental distress is so extravagant an amount as to be unjust . . . [and] $250,000 for the physical pain, residual irritation, and humiliation . . . [the plaintiff] described is grossly excessive." (App. 4a). Judge Zobel found that $75,000 is the "maximum a jury could reasonably award plaintiff for the physical and mental injuries he sustained . . ." *Id.*

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[1] Abreviations used herein: "App." for Appendix to this petition, "Tr." for trial transcript, and "Rec. App." for the record appendix filed with the court below.

The plaintiff accepted the remittitur and Trooper Harvey appealed.

On December 23, 1986, the United States Court of Appeals for the First Circuit rendered an unpublished opinion (App. 5a-11a) affirming the judgment of the district court, and entered judgment (App. 12a). The court found that plaintiff's argument was error, said it could not "approve or condone" it (App. 7a), "agree[s]" it was "improper" (App. 9a), but held that it was not prejudicial. Trooper Harvey's petition for rehearing in banc was denied on January 27, 1987 (App. 13a).

Statement of the Facts.

At approximately 9 P.M. on November 1, 1977, the petitioner, Trooper Harvey, who was on solo cruiser patrol, observed the plaintiff's 1977 red panel Chevrolet van proceeding southbound on Interstate Route 95 (and U.S. Route 1) in Peabody, Massachusetts, an area of lounges, liquor stores, and road clubs. Trooper Harvey noted that the rear license plate of the van was bent up so that it could not be read, a violation of Massachusetts law.[2] Aware that he was patrolling a high crime area, and that the bending or hiding of a license plate could indicate intentional evasion, and cognizant of a violation of the Commonwealth's motor vehicle laws, Trooper Harvey

[2] Masschusetts General Laws c. 90, § 6, requires the display of motor vehicle number plates, and in pertinent part provides:

> The said number plates shall be kept clean with the numbers legible and shall not be obscured in any manner by the installation of any device obscuring said numbers, and during the period when the vehicle or trailer is required to display lights the rear register number shall be illuminated so as to be plainly visible at a distance of sixty feet.

stopped the van (Tr. Vol. IV, 56-58, Vol. V, 45-48). The plaintiff's girlfriend was driving. Trooper Harvey asked her for her license and registration. She handed him her license. The plaintiff was in the front passenger seat. He handed Trooper Harvey his registration and remarked, "What are you stopping us for? We're [sic] [not] druggies or muderers." (Tr. Vol. V, 50-51). At this point, the trooper heard someone in the back of the van make the statement, "Keep quiet, Richard." The trooper shined his flashlight into the back of the van. He could make out two or three males. Trooper Harvey advised the driver of the bent plate and asked the occupants for identification. The plaintiff, and two of the three men in the rear complied — Richard Pitts and Thomas Nickerson. The third man, Wayne Subatch, the plaintiff's brother, did not. He claimed his license was suspended (Tr. Vol. V, 51-52).

Trooper Harvey returned to his cruiser and called his dispatcher, Corporal Cronin, at the nearby Lynnfield, Massachusetts State Police Barracks. According to procedure, he requested a check of "missings and wanteds" on the four individuals who had made identification. While Trooper Harvey was awaiting the report, Wayne Subatch appeared at his cruiser. He inquired if everything was going to be all right. Trooper Harvey informed him that as soon as he checked things out, they could be on their way. At this time Harvey asked Wayne Subatch for his date of birth. He detected Wayne Subatch had been drinking (Tr. Vol. V, 53-54).

Meanwhile, Corporal Cronin dispatched Trooper Albert Balestra as a back-up unit to Trooper Harvey's location (Tr. Vol. IV, 58-60). Trooper Harvey was still in his cruiser when Trooper Balestra arrived (Tr. Vol. V, 55). Upon arrival, Trooper Balestra observed that Wayne Subatch was standing beside Harvey's cruiser (Tr. Vol. IV, 62). Trooper Balestra exited his cruiser and approached within three feet of the passenger side of the van. He heard sounds coming from the back of the van, the side door was open slightly. There being no

windows on the side of the van, Trooper Balestra could not see into the back of the van. He became concerned for his safety. He asked the plaintiff and the other occupants of the van to step out so he could have them in view. Balestra informed them that if everything checked out they would be on their way (Tr. Vol. IV, 62-65).

To this request and informative, the plaintiff immediately said, in a "belligerent" manner, "Fuck you. I'm not moving and you will not make me move." (Tr. Vol. IV, 68). Balestra could smell alcohol on the plaintiff's breath. No one exited the vehicle. *Id.*

At this time Wayne Subatch was returning from Trooper Harvey's cruiser and came along side the van door. He said to Trooper Balestra, "Look, we've had a few beers, there's no problem." (Tr. Vol. IV, 69). Trooper Balestra explained "Look, I want everyone out of this van, and if everything checks out, you can go on your way." *Id.* Balestra noticed that Wayne Subatch had a strong odor of alcohol on his breath (Tr. Vol. IV, 70).

Again Trooper Balestra requested the occupants of the van to get out. This time, the plaintiff responded, "You're a fucking asshole and I'm not moving." *Id.* Trooper Balestra advised the plaintiff that if he didn't get out of the van he would be placed in protective custody.[3] *Id.* To this, the plaintiff said, "Fuck off." *Id.*

Concerned that the plaintiff was trying to incite the others to escalate the situation, Trooper Balestra called to Trooper

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[3]Massachusetts General Laws c. 111B, § 8, empowers a police officer to take into protective custody a person incapacitated by intoxication, with or without such person's consent. It further provides that a person taken into protective custody shall not be considered to have been arrested or to have been charged with any crime. Section 13 of said c. 111B, protects police officers acting in a "reasonable manner" from criminal or civil liability for acts of protective custody.

Harvey to radio for another back-up. He then started to open the passenger door (Tr. Vol. IV, 71). At this time Trooper Balestra noticed Officer Steven Begley of the Peabody Police Department approaching the van. Officer Begley was patrolling the area and had heard the state police transmissions (Tr. Vol. V, 150-151). Trooper Balestra yelled to Officer Begley that he was taking the plaintiff "in for PC [protective custody]." (Tr. Vol. IV, 72). Trooper Harvey completed his call for back-up, and joined the other two officers at the van (Tr. Vol. V, 55-56). The plaintiff was ordered to get out of the vehicle. He persisted in his refusal. A struggle ensued (Tr. Vol. IV, 73). The plaintiff vigorously and violently resisted (Tr. Vol. V, 152-159). He was subdued and transported in Officer Begley's cruiser, which was equipped with a cage, to the state police barracks in Lynnfield.

There Trooper Balestra and Officer Begley removed the plaintiff from Begley's cruiser and brought him into the barracks. The plaintiff continued his struggles and screams. Begley and Balestra placed the plaintiff on the floor of the guardroom, against a wall, and went into the next room to make their reports (Tr. Vol. IV, 85-90, Vol. V, 160-161). Trooper Harvey, who was in the hall to the guardroom, had the plaintiff in view (Tr. Vol. V, 182). The plaintiff was yelling and thrashing about on the floor. Trooper Harvey testified that he approached the plaintiff, told him to behave himself, and started to lift him from the floor, intending to place him in a chair. Trooper Harvey testified that he lifted the plaintiff by the back of the shirt, that the plaintiff wrested from his grip and fell to the floor injuring his head (Tr. Vol. V, 64-66).

The plaintiff claimed that his van was stopped without justification and that he was forcibly removed from his motor vehicle and taken into custody without probable cause. He testified that he was beaten and clubbed about his body and

head when he was taken from his vehicle;[4] and that in the state police barracks guardroom he was jostled by several officers, pushed to the floor, and hit from behind causing his head to hit the floor resulting in a laceration over his left eye. One of the plaintiff's companions, Thomas Nickerson (who was also taken into custody), testified that he saw the defendant Harvey kick the plaintiff in the back of the head causing the injury (Rec. App. 97).

The plaintiff, a self-employed carpenter, "adduced no evidence of medical expenses, lost earnings, or lost earning capacity" (App. 3a). He claimed to have had headaches as a result of his injury, that his left eye was sensitive to light, and that he habitually touches the site of the injury. He testified that he was greatly disturbed by his experience (Rec. App. 82-88). His medical treatment consisted of the out-patient repair of the laceration, several visits to his family doctor who removed the stitches, prescribed aspirin, and advised the plaintiff to return "if it gets any worse." (Rec. App. 84).

The jury found that there had been probable cause to take the plaintiff into custody as a person incapacitated by reason of the consumption of intoxicating liquor pursuant to G.L. c. 111B, §§ 8, 13 (Rec. App. 226), and that the use of physical force to accomplish that purpose was not in excess of that reasonably necessary. *Id.* However, the jury found that the petitioner had used unjustified and excessive physical force against the plaintiff at the barracks, and, despite the plaintiff's limited medical showing, returned a finding of $250,000 compensatory damages on this claim (Rec. App. 226-227). The jury also found against the petitioner on the plaintiff's claim of intentional infliction of emotional

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[4] The several officers who effectuated the protective custody testified that no clubs or flashlights were used to hit the plaintiff, as he had claimed, but only manual force to subdue and handcuff him.

distress and awarded a second $250,000. In addition the jury assessed $10,000 in punitive damages against the petitioner. *Id.*

Reasons for Granting the Writ.

THE CLOSING ARGUMENT OF COUNSEL FOR THE PLAINTIFF IN A CIVIL RIGHTS ACTION WAS PREJUDICIAL IN INVOKING THE IMAGERY, VIOLENCE, AND LAWLESS CONDUCT OF POLICE INSPECTOR "DIRTY HARRY" CALLAHAN, A CLINT EASTWOOD FILM CHARACTER, AS SUGGESTIVE OF THE CHARACTER AND CONDUCT OF THE DEFENDANT, A MASSACHUSETTS STATE POLICE TROOPER, IN THE ALLEGED BEATING OF THE PLAINTIFF; AND IN ARGUING THAT A STATE POLICE INTERNAL INVESTIGATION HAD FOUND MISCONDUCT BY THE DEFENDANT, WHERE THERE WAS NO EVIDENCE OF SUCH FINDINGS, WHERE PLAINTIFF'S COUNSEL HAD BEEN SPECIFICALLY INSTRUCTED NOT TO MAKE SUCH ARGUMENT, AND WHERE PLAINTIFF'S COUNSEL HAD GIVEN HIS ASSURANCE TO THE COURT THAT HE WOULD NOT, SO AS TO CONSTITUTE A DENIAL OF DUE PROCESS OF LAW, OR TO JUSTIFY THIS COURT'S EXERCISE OF ITS BROAD SUPERVISORY POWER OVER THE FEDERAL COURTS.

The theme of the plaintiff's case was police harassment, lawlessness, and brutality. At the outset of his argument plaintiff's counsel labeled Trooper Harvey's character by invoking the archetype of police lawlessness, ruthlessness, and violence, "Dirty Harry," Clint Eastwood's well chiseled movie character, Harry Callahan.

> MR. JABOUR: . . . If any of you have seen that movie "Dirty Harry," a police movie where Clint

> Eastwood portrays a police officer who takes the law into his own hands, if you recall a scene from that movie, Harry has a guy in the corner —

(Rec. App. at 165). All counsel interrupted: "Objection." *Id.* The court merely responded:

> Oh, I understand this is not to be evidence in this case, but simply argument and the jury will take it as such.

Id. Rather than stop counsel, the court permitted the continuance of the improper argument:

> MR. JABOUR: Harry has somebody pinned in the corner and he says to them, "Make my day. Make my day."
>
> And the guy moved the wrong way. And what does he get? He gets shot.

Id.

Counsel focused his "Dirty Harry," characterization on the defendant Harvey at the barracks. Referring to the plaintiff having been hit from behind, he argued:

> Do you think dirty deeds are committed in front of you?

(Rec. App. at 174).

A. *Dirty Harry Image Well Known.*

There is little chance that the jury did not know the character to whom counsel made reference. References to "Dirty Harry" can be found in crossword puzzles.[5] His message of "law and order" is insidious.[6] Public awareness of the character is evident in popular references such as the review of the television program, "Lady Blue," which was attached to the petitioner's motion for new trial.[7] "Dirty Harry" has entered the literature.[8] Harry Callahan has even spawned scholarly writing dealing

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[5] *Viz*: "Emulate Dirty Harry." The Boston Globe Magazine, April 13, 1986, p. 79 (solution "ENFORCE," *id.*at p. 60).

[6] ["Dirty Harry"] has no pretensions to art: it is a simply told story of the Nietzchean superman and his sado-masochistic pleasures.

. . . .

"Dirty Harry" is a film without mercy; the violence is the most extreme I have ever seen, relentless and graphic. Its message is an assault on the concept of law. Society must give its highest men — Nietzchean policemen — complete freedom to do as they see fit in a total war between good and evil.

Epps, *Does Popeye Doyle Teach Us How to Be Fascist?*, "Film Reviews," N.Y. Times, May 21, 1972, sec. II, p. 11, col. 1 (Reprint from Harv. Crim).

[7] It's obvious from the first scene of the "Lady Blue" pilot that we're dealing with Dirty Harry in drag.

(Rec. App. at 30-31). See also advertisement of "Lady Blue" as "ABC's DIRTY HARRIET." Boston Globe, September 26, 1985, p. 32 (Addendum to Defendant's Brief before the court below, p. 30).

[8] In a current novel a Russian spy receives training by viewing American TV.

Helder took a deep breath and went immediately to the TV set. A man called Rather was reading the news as if he had experienced all of it. . . . Helder sat down and switched channels. He watched, transfixed, for an hour as an outrageous policeman called Dirty Harry turned San Francisco into a war zone.

Woods, *Deep Lie*, p. 27 (Norton 1986).

with a phenomenon recognized as "The Dirty Harry Problem" in law enforcement.[9] The court below noted:

> The "Dirty Harry" character is a violence-prone policeman who dispenses his own brand of justice without regard for constitutional rights.

(App. 7a).

It is plain that counsel's argument was calculated to impress upon Trooper Harvey the "Dirty Harry" character.[10] Through this most efficient and improper tactic counsel succeeded in presenting Trooper Harvey as a fully developed, lawless, ruthless and violent individual, one likely to kick the plaintiff in

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[9] Klockars, *The Dirty Harry Problem*, Annals of the American Academy of Political and Social Science, November 1980, p. 33.

> ABSTRACT: Policing constantly places its practitioners in situations in which good ends can be achieved by dirty means. When the ends to be achieved are urgent and unquestionably good and only a dirty means will work to achieve them, the policeman faces a genuine moral dilemma. A genuine moral dilemma is a situation from which one cannot emerge innocent no matter what one does — employ a dirty means, employ an insufficiently dirty means, or walk away. In such situations in policing, Dirty Harry problems, the danger lies not in becoming guilty or wrong — that is inevitable — but in thinking that one has found a way to escape a dilemma which is inescapable. Dire consequences result from this misunderstanding. Policemen lose their sense of moral proportion, fail to care, turn cynical, or allow their passionate caring to lead them to employ dirty means too crudely or too readily.

Id.

[10] In result, counsel violated Fed. R. Evid. R. 404(a):

> (a) Character evidence generally. Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion. . . .

the head. Thus, the image conjured for the jury at the barracks was a flashback drama of a trademark "Dirty Harry" scene, with Trooper Harvey in the role of "Dirty Harry" Callahan, the plaintiff sprawled upon the floor, and Harvey over him reading the lines, "Go ahead punk, try to get up, make my day," followed by the kick to the head. The vision is too clear to be ignored — just as intended by counsel. It gave prejudicial credence to the plaintiff's claim that Trooper Harvey kicked his head to the floor.

While saying that it "in no way approve[s] or condone[s] the plaintiff's reference," the court below finds no prejudicial error (App. 7a). Distinguishing several of the cases of prejudicial argument cited by the defendant[11] from the instant case, the

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[11] *See Commonwealth* v. *Graziano*, 368 Mass. 325, 331-332 (1975). Conviction reversed where the prosecutor in closing argument made prejudicial remarks concerning the defendant's ethnic background. He made reference to "Al Capone" and the novel *The Godfather* ("[w]e've even got the godfather in this case"). *Id.* at 331.

Computer Systems Engineering, Inc. v. *Qantel Corp.*, 740 F.2d 59, 69 (1st Cir. 1984) (opposing counsel likened in closing argument to "Pontius Pilate . . . most outrageous" but issue waived by failure to object); *Koufakis* v. *Carvel*, 425 F.2d 892 (2d Cir. 1970) (argument to liken defendant to head man in a Mafia organization was prejudicial):

> The trial judge should have categorically ordered [plaintiff's counsel] to stop making such remarks and given the strongest possible cautionary instruction. As the trial judge never did make clear that this aspect of . . . argument was grossly improper, it is likely that . . . the jury . . . considered his failure to intervene as tacit approval of the line of argument.

Id. at 901; *Steele* v. *United States*, 222 F.2d 628, 631 (5th Cir. 1955) (unfair argument in "characterization of the defendant as a Dr. Jekyll and Mr. Hyde. . . ."); *People* v. *Barry*, 4 N.E. 2d 717, 529 (Ill. App. 1936) (reference to defendant as "Judas" required reversal).

Also cited as a surprisingly similar instance of improper argument by counsel (reference to TV program) where the trial judge likewise overruled objection with the comment that it was "just argument," was *Commonwealth* v. *Clary*,

court says (rather remarkably), "the salient characteristics of the 'Dirty Harry' character . . . [were] attributable to the defendant's alleged conduct in the case at bar." *Id.* Not only is this a selective view of the prejudicial "attributes" conjured by the "Dirty Harry" reference, but, far from excusing the impact of characterization found to be improper, makes clear that the jury must have considered it.

Furthermore, this rationalization of the "Dirty Harry" invocation discloses that the court below failed to recognize Trooper Harvey's argument that he was thus invested with a character which made it appear more likely that he did kick the plaintiff in the head. The characterization displayed him as one so disposed, as one with a propensity to so act. The characterization was not merely an improper manner of describing the tenor or nature of the conduct on the occasion in question — as appears to be the view taken by the court below — but constituted improper and independent evidence of the *likelihood* of the conduct occuring at all.

B. *Failure to Recognize Significance of Inflated Verdict.*

The court below concludes that "any impropriety in plaintiff's closing argument did not taint the jury's verdict and did not necessitate a new trial." (App. 8a).

But something must have "tainted" the jury's verdict. The trial judge found that the half-million dollar verdict was " 'grossly excessive,' 'inordinate,' 'shocking to the conscience of the court,' or 'so high that it would be a denial of justice

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388 Mass. 583, 447 N.E.2d 1217, 1221 (1983). There the court found error and reversed stating that the "judge's instructions to the jury, which stated only in general terms that the arguments of counsel are not evidence did not cure adequately the prejudicial impact. . . ." *Id.*

to permit it to stand,'" and remitted to $75,000 (App. 4a). The court below appears to have overlooked the significance of a verdict more than six and one-half times the "maximum a jury could reasonably award'" *Id.*; that "impropriety may be inferred from excessiveness or inadequacy of a verdict." *Evers* v. *Equifax, Inc.*, 650 F.2d 793, 798 (5th Cir. 1981).[12] Remittitur may not be employed where the verdict is the result of passion or prejudice. 11 C. Wright & A. Miller, Federal Practice & Procedure § 2815, at 103.[13]

C. *Investigator's Opinion.*

During his case-in-chief, plaintiff's counsel called Joseph A. Stone, a Massachusetts State Police Sergeant, since retired, who had conducted an investigation of the incident in his capacity as a member of the Internal Affairs Unit of the Massachusetts State Police. He testified that he interviewed, among others, the plaintiff, Pitts, Nickerson, and Wayne Subatch, and all the officers involved, including the defendant Harvey, Trooper Balestra, and Officer Begley (Tr. Vol. IV, 12-18). He testified that he prepared a comprehensive report in excess of twenty pages (Rec. App. at 115).

Counsel asked the witness if he had formed any opinions in his report ("as to whether any of these officers should be

[12] *See also, Richardson* v. *Communications Workers of America*, 530 F.2d 126, 129 (8th Cir. 1976) ("inference of passion or prejudice was drawn from the size of the verdict alone. . . ."); *Koufakis* v. *Carvel*, 425 F.2d 892, 901 (2d Cir. 1970) ("[I]n assessing the impact which [counsel's] repeated improprieties had on the jury we cannot disregard the fact that the award was reduced by the trial judge as grossly excessive. . . .")

[13] Among the authors' citations to authority is: *Minneapolis Etc, Ry.* v. *Moquin*, 283 U.S. 520, 521-522 (1931).

> [N]o verdict can be permitted to stand which is found to be in any degree the result of appeals to passion and prejudice. . . . A litigant gaining verdict thereby will not be permitted the benefit of calculation, which can be little better than speculation, as to the extent of the wrong inflicted upon his opponent.

disciplined, Sir?") (Rec. App. 116). All defense counsel objected. The objections were sustained. *Id.*

Plaintiff's counsel then undertook a line of questioning with the investigator witness as to whether there existed state police department rules and regulations prescribing the conduct of state police officers in situations such as those at issue; and whether the witness had made reference to such regulations in his report. Over objection by all defense counsel, plaintiff's counsel was permitted to elicit the witness' responses that such regulations did exist, and that the witness had considered them in his report (Rec. App. at 117-118). Over further objection (of all counsel), plaintiff's counsel was permitted to elicit the specific rules to which the investigator had made reference in his report (Rec. App. at 118): regulations concerning "amount of force necessary, custody of a prisoner" (Tr. Vol. IV, 35), "officer's demeanor" (Tr. Vol. IV, 36), and "[c]ommand of temper." *Id.*

In permitting plaintiff's counsel to pursue this dangerous line of questioning, the court issued a firm caveat:

> I will allow him to make reference to rules and regulations, but I tell plaintiff's counsel that we will not get into and you will not offer to the jury, directly or indirectly, what he concluded.

(Rec. App. at 118-119). Plaintiff's counsel responded:

> I realize that, your Honor, and I will keep away from his conclusions.

(Rec. App. at 119).

Despite the court's warning and counsel's acknowledgment of the limits placed upon him, and in violation of the court's rulings excluding evidence as to whether the investigator had

formed any opinions in his report, plaintiff's counsel argued that the investigator *had* formed opinions — and he argued the very vice at which the rulings and warning were directed. He suggested that the investigator had formed opinions of misconduct by Trooper Harvey, that Harvey had breached the regulations. He suggested this from the failure of the defendant to call the investigator as his own witness:

> MR. JABOUR: Now, you heard Sergeant Stone testify, formerly Sergeant Stone of the Massachusetts State Police.
>
> You heard him testify to what he observed. You heard him testify. He observed the same injuries that are on those pictures. And you heard him testify that he had conducted an internal investigation. And he told you what he was investigating. And he told you he formed some opinions.
>
> Now, I ask you, ladies and gentlemen, why didn't the defense call him?
>
> MR. JENNINGS [Trooper Harvey's counsel]: I object.
>
> THE COURT: Sustained.
>
> MR. JENNINGS: May I have an instruction, your Honor?
>
> THE COURT: Go ahead.
>
> MR. JABOUR: Thank you your Honor.

(Rec. App. at 178-179).

The court below "agree[d] that the plaintiff's remark was improper and, if uncorrected, could have had a prejudicial impact on the defendant's case." (App. 9a). The court said:

> A jury might well regard a determination of wrongdoing by the state police following a internal investigation to be objective, credible, and persuasive. Plaintiff's remark improperly implied that Mr. Stone

> did find wrongdoing and that it was for that reason that the defendant did not call him as a witness.

Id. Counsel's argument in this respect was a blatant disregard of the trial judge's ruling and a betrayal of his assurance. It was calculated to place before the jury the very prejudice intended to be avoided. However, the court below concludes that the trial judge's instruction respecting failure to call witnesses, "adequately conveyed to the jury the message that the jury should not draw adverse conclusions from a party's failure to call a particular witness." *Id.*

The confidence the court below appears to draw from the trial judge's instructions, with respect, is misplaced. The court below itself recognized plaintiff's argument was two pronged: first, that "Mr. Stone did find wrongdoing" *Id.*; second, that "for that reason the defendant did not call him as a witness." *Id.* The instruction went only to a failure to call witnesses. It was not directed at, nor was it adequate to remove the impact of plaintiff's improper argument of an official finding of wrongdoing. Accordingly, it went uncorrected, and it was prejudicial.

This argument by the plaintiff was entirely indefensible. In this case counsel's argument *did* "manipulate or misstate the evidence." *Darden* v. *Wainwright,* U.S. , 106 S.Ct. 2464, 2472 (1986).[14] Indeed, the plaintiff made no attempt in his brief to the court below to justify his conduct. Surely, plaintiff's counsel was permitted to capitalize on his own wrongdoing.

---

[14] In *Darden* v. *Wainwright, supra,* the court acknowledged that the argument of the prosecution was improper as emotionally excessive, but held that it was not prejudicial, because, *inter alia,* it did not "manipulate or misstate the evidence. . . ."

Conclusion.

It is most distressing that the court below finds error in the plaintiff's argument, says it does not "approve or condone," "agree[s]" it was "improper," but affirms the judgment. The court finds harmless error in a most dubious context, a context where the verdict returned by the jury was so excessively unreasonable.

It is further distressing that plaintiff's counsel, who could muster no justification or excuse for his intentional and improper conduct, is vindicated in result.

The result is to reward the plaintiff for conduct which was found to be improper. The consequence can be none other than to motivate overreaching by trial counsel in the quest of "winning." Truly the message here is that the ends justify the means. Words of reproof are lost in the celebration of a victorious result. It does not appear that justice was done.[15]

The petitioner respectfully maintains that he was denied due process of law.

Further, the petitioner respectfully submits that this is a case where the Court ought exercise its "broad . . . supervisory power"

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[15] See *Brown* v. *Royalty*, 535 F.2d 1024 (8th Cir. 1976), where despite a ruling on plaintiff's motion *in limine* that evidence that defendant had not received a traffic ticket arising out of the instant matter was inadmissible (so as to infer the defendant was not at fault), and despite assurances of defendant's counsel that he would make no such reference, he did, the court reversed and remanded for new trial "in the interest of fairness" even though the trial judge had sustained the plaintiff's objections, ordered the references struck and instructed the jury to disregard.

over the federal courts, which power was unavailable to the Court in *Darden* v. *Wainwright, supra*.[16]

Respectfully submitted,

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[16] *Darden* v. *Wainwright*, involved the issue of a claim of improper closing argument of a prosecutor in the context of a habeas corpus claim arising out of a state conviction. This Court was confined by the "appropriate standard of review for such a claim on writ of habeas corpus . . . [as] 'the narrow one of due process and not the broad exercise of supervisory power.'" *Darden* v. *Wainwright*, *supra* at 106 S.Ct. 2472, *citing*, *Donnelly* v. *DeChristoforo*, 416 U.S. 637, 642 (1974).

Appendix.

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Appendix.

JUDGMENT IN A CIVIL CASE

United States District Court
DISTRICT — Massachusetts

RICHARD A. SUBATCH
V. CA 80-2358-Z
THEODORDE HARVEY, ALBERT BALESTRA and STEVEN BEGLEY JUDGE RYA W. ZOBEL

☒ **Jury Verdict.** This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict., on special questions,

☐ **Decision by Court.** This action came to trial or hearing before the Court with the judge (magistrate) named above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

Judgment for the plaintiff Richard A. Subatch against the defendant Theodore Harvey in the amount of $500,000.00 in compensatory damages and $10,000.00 in punitive damages for a total judgment of $510,000.00, plus plaintiff's costs to be taxed. Judgment for the defendants Albert Balestra and Steven Begley.

Approved as to form:

/s/Rya W. Zobel 9/10/85
United States District Judge
Docketed
CLERK — George F. McGrath DATE
(BY) DEPUTY CLERK — Nina E. Saab 9/10/85

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 80-2358-Z

RICHARD A. SUBATCH
vs.
THEODORE E. HARVEY

MEMORANDUM OF DECISION

ZOBEL, D.J.

In response to special questions, a jury determined that defendant Theodore Harvey, a State Police officer, violated plaintiff's civil rights and that he intentionally inflicted emotional distress in violation of state law. It awarded compensatory damages of $250,000 for each claim, for a total of $500,000, and it assessed punitive damages of $10,000 in connection with the civil rights claim. Defendant has moved for a new trial and for a remittitur.

The jury's determination of defendant's responsibility is amply supported by the evidence, as is its judgment to award punitive damages; the motion for a new trial on those issues is, therefore, denied. The compensatory damages the jury awarded are, however, grossly excessive.

Plaintiff alleged violations of his rights under federal and state law by two State Police officers, defendant Theodore Harvey, and Albert Balestra, and a police officer of the Town of Peabody, Steven Begley, in two separate but related incidents. According to the evidence, the first incident began on Route 1 in Peabody when defendant Harvey stopped a van owned by plaintiff but driven by his friend, Virginia Folan. Defendant testified that he stopped the vehicle because it allegedly had a bent license plate, but he refused to inform the

occupants of the van of the reason. Plaintiff thereupon refused to identify himself and to get out of the van. Trooper Harvey called for assistance, and a number of state and local police officers, including the other two defendants, arrived, and ultimately plaintiff was arrested. Up to this point the jury exonerated all defendants of any wrongdoing.

After his arrest plaintiff was transported to the Lynnfield State Police Barracks and taken to a room where the second incident took place. Viewing the evidence in the light most favorable to plaintiff, as I must, *McDonald* v. *Federal Laboratories, Inc.*, 724 F.2d 243, 246 (1st Cir. 1984) (citing *Betancourt* v. *J.C. Penney Co., Inc.*, 554 F.2d 1206, 1207 (1st Cir. 1977)), defendant Harvey, without provocation, hit plaintiff from behind. Plaintiff, who was handcuffed, fell forward to the floor on his face. When he raised his head defendant kicked him in the back of the head, smashing his face to the floor once again. Plaintiff sustained a cut on his forehead just over his left eye. It bled profusely and he was taken by ambulance to the Lynn Union Hospital. He received seven stitches and was shortly thereafter released to the attending police officers who took him to jail until he was bailed.

Plaintiff adduced no evidence of medical expenses, lost earnings, or lost earning capacity. He did testify that he suffered extreme physical pain the night of the incident and the following day. For a period of eighteen months to two years he experienced headaches and a sensitivity to light which required him to wear dark glasses even indoors. He has a permanent scar from which he to this day continues to feel irritation that causes him to touch and rub the area surrounding it. Plaintiff had never before been arrested and he gave eloquent testimony of the humiliation to which defendant's conduct subjected him and the mental distress he suffered as a consequence. He continues to feel outrage and to fear police.

The parties agree that a remittitur may be granted only if the verdict is "grossly excessive," "inordinate," "shocking to the conscience of the court," or "so high that it would be a denial of justice to permit it to stand." *McDonald,* 724 F.2d at 246. The verdict in this case fits squarely within that standard. Even granting plaintiff's ongoing distress and fear, $250,000 for such mental distress is so extravagant an amount as to be unjust. Even giving full scope to plaintiff's other evidence of damages, $250,000 for the physical pain, residual irritation, and humiliation he described is grossly excessive. In view of the evidence presented, the maximum a jury could reasonably award plaintiff for the physical and mental injuries he sustained is the sum of $75,000.

For the reasons stated, defendant Harvey's motion for a new trial is denied on the issues of liability and punitive damages. A new trial is ordered on the issue of compensatory damages unless plaintiff accepts a remittitur of the amount in excess of $75,000. Plaintiff shall notify the Court of his decision by December 13, 1985.

December 3, 1985
DATE

/s/Rya W. Zobel
DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
For the First Circuit

No. 86-1022

RICHARD A. SUBATCH,
Plaintiff, Appellee,

v.

THEODORE E. HARVEY,
Defendant, Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[Hon. Rya W. Zobel, U.S. District Judge]

Before

Coffin, Bownes, and Torruella,
Circuit Judges.

John J. Jennings, Frawley & Jennings and *Charles M. Burnim* on brief for appellant.

George Jabour, Daniel Chaffee and *Denner & Benjoya* on brief for appellee.

December 23, 1986

Per Curiam. Plaintiff-appellee Richard Subatch filed a complaint in the District of Massachusetts seeking compensatory and punitive damages under 42 U.S.C. § 1983 and Massachusetts law for alleged illegal detention and beatings at the hands of defendant-appellant Theodore Harvey, a Massachusetts police trooper, and other policemen. A jury returned a verdict for plaintiff against defendant Harvey in the amount of $500,000 compensatory damages and $10,000 punitive damages. On December 3, 1985, the district court (Zobel, J.) denied defendant's motion for a new trial as to liability but ordered a new trial as to damages unless plaintiff accepted a remittitur of the amount in excess of $75,000. Plaintiff accepted the remittitur. Defendant appealed. We affirm.

Defendant's first contention is that plaintiff's closing argument was prejudicial, warranting a new trial, in that plaintiff likened defendant's alleged conduct to that of the Clint Eastwood film character, "Dirty Harry" Callahan. Plaintiff's counsel, Mr. Jabour, argued as follows:

> MR. JABOUR: . . . If any of you have seen that movie "Dirty Harry," a police movie where Clint Eastwood portrays a police officer who takes the law into his own hands, if you recall a scene from that movie, Harry has a guy in the corner —
>
> ALL COUNSEL: Objection.
>
> THE COURT: Oh, I understand this not to be the evidence in this case, but simply argument and the jury will take it as such.
>
> MR. JABOUR: Harry has somebody pinned in the corner and he says to them, "Make my day. Make my day."
>
> And the guy moves the wrong way. And what does the guy get? He gets shot.
>
> Now, what is the true picture we saw from that witness stand?

Plaintiff argues that defendant cannot raise this issue because he failed below to preserve it for appeal. While defendant could have done more to apprise the court of his continuing objection, *Curreri* v. *International Brotherhood of Teamsters*, 772 F.2d 6, 13 (1st Cir. 1983), we are reluctant to find waiver on this record.

However, while we in no way approve or condone plaintiff's reference, we cannot find that the trial court's decision to permit it constituted prejudicial error under the circumstances of this case. The "Dirty Harry" character is a violence-prone policeman who dispenses his own brand of justice without regard for constitutional rights. The record reveals that plaintiff introduced evidence that one or more of the defendants verbally abused him, hit him in the head, pushed him to the floor, and smashed his head to the floor. These allegations were at the heart of plaintiff's claims. Consequently, plaintiff's reference to the "Dirty Harry" character was closely tied to the theory of plaintiff's case and the evidence adduced in support of that theory. This is not a case where counsel's argument improperly attempted to taint the opposing party in jurors' minds with irrelevant negative characteristics associated with a real or fictional character or organization, *see, e.g., Koufakis* v. *Carvel*, 425 F.2d 892 (2d Cir. 1970) (comparison with Mafia); *Steele* v. *United States*, 222 F.2d 628, 631 (5th Cir. 1955) (comparison with Dr. Jekyll & Mr. Hyde). Nor does the reference here involve any improper religious or ethnic appeal. *See, e.g., Computer Systems Engineering, Inc.* v. *Qantel Corp.*, 740 F.2d 59, 69 (1st Cir. 1984) (comparison with Pontius Pilate). Instead, the salient characteristics of the "Dirty Harry" character mentioned by plaintiff are, if plaintiff's evidence is believed, attributable to defendant's alleged conduct in the case at bar.

It is true that plaintiff referred to "Dirty Harry" shooting a victim, whereas there is no such allegation here. Still, we cannot

doubt that this distinction was clear to the jury. Also, the district court did instruct the jury, in the midst of plaintiff's "Dirty Harry" reference, that plaintiff's remarks were "not . . . evidence in this case, but simply argument." It is well-settled that because the trial judge is best able to determine the effect of counsel's arguments upon the jury, the trial judge enjoys considerable discretion in exercising supervision over counsel's arguments. *Emery-Waterhouse Co.* v. *Rhode Island Hospital Trust National Bank*, 757 F.2d 399, 410 (1st Cir. 1985). Under all the circumstances here, we cannot say that the trial court abused its discretion in finding that any impropriety in plaintiff's closing argument did not taint the jury's verdict and did not necessitate a new trial.

Defendant also objected to plaintiff's reference in his closing argument to the outcome of an internal police investigation of the alleged police mistreatment of plaintiff. During the trial plaintiff examined Joseph A. Stone, the policeman who conducted the investigation, but the court did not permit plaintiff to inquire into Mr. Stone's conclusions. In closing argument, however, plaintiff's counsel argued as follows:

> MR. JABOUR: Now, you heard Sergeant Stone testify, formerly Sergeant Stone of the Massachusetts State Police.
>
> You heard him testify to what he observed. You heard him testify. He observed the same injuries that are on those pictures. And you heard him testify that he conducted an internal investigation. And he told you what he was investigating. And he told you he formed some opinions.
>
> Now, I ask you, ladies and gentlemen, why didn't the defense call him?
>
> MR. JENNINGS: I object.
>
> THE COURT: Sustained.

MR. JENNINGS: May I have an instruction, your Honor?

THE COURT: Go ahead.

MR. JABOUR: Thank you, your Honor.

Thus, the trial court sustained the objection of defendant's counsel, Mr. Jennings, but denied defendant's request for an immediate curative instruction. Defendant seeks a new trial, citing prejudice.

Plaintiff does not quarrel with defendant's contention, and the trial court's finding, that the substance of Mr. Stone's conclusions was inadmissible. *But cf.* Fed.R.Evid. 803(8)(C). In any event, we agree that plaintiff's remark was improper and, if uncorrected, could have had a prejudicial impact on defendant's case. A jury might well regard a determination of wrongdoing by the state police following an internal investigation to be objective, credible, and persuasive. Plaintiff's remark improperly implied that Mr. Stone did find wrongdoing and that it was for that reason that defendant did not call him as a witness.

However, although the trial judge did not provide an immediate curative instruction as requested, shortly thereafter the trial judge did instruct the jury, "Lots of people didn't testify. You should not draw any inferences from the fact that they didn't, on either side, the plaintiff or defendants." Later, in its jury instructions, the court again stated, "You should not draw any inference from the fact that certain witnesses were not here." These instructions adequately conveyed to the jury the message that the jury should not draw adverse conclusions from a party's failure to call a particular witness. Also, the record indicates that plaintiff introduced ample evidence in support of his case against defendant Harvey. The strength of plaintiff's evidence renders it less likely that the verdict against defendant was influenced by prejudice caused by coun-

sel's remark. Under all the circumstances, therefore, we cannot say that the trial court abused its discretion in determining that the probability of prejudicial impact was not substantial enough to require further curative instructions or a new trial.

We see little merit in defendant's objection to the district court's refusal to admit into evidence a prior written statement of Virginia Amaro Folan, a non-party witness. The statement was inadmissible to show the truth of the matters asserted therein because it is hearsay under Fed.R.Evid. 801(d)(1). Even assuming, furthermore, that the trial court erred in refusing to admit the written statement for impeachment purposes only, *see* Fed.R.Evid. 613(b), this was a harmless, insubstantial error that did not prejudice defendant's case. *See* Fed.R.Evid. 103(a); Fed.R.Civ.P. 61. Since defendant made generous use of the statement to impeach Folan's testimony upon cross-examination, exclusion of the document itself denied the jury mere cumulative impeachment evidence. *Cf. deMars* v. *Equitable Life Assurance Society of the United States,* 610 F.2d 55, 61-62 (1st Cir. 1979) (exclusion of cumulative, repetitious evidence was harmless error).

Defendant's challenge to the district court's failure to grant defendant's request for a hearing to present evidence on his motion for a new trial is meritless. Defendant was not entitled to a hearing; this was, instead, a matter left entirely to the court's discretion. *See* District of Mass. Local Rule 12(e). Defendant has said nothing to suggest any abuse of discretion.

Finally, defendant attacks the trial court's order of remittitur. First, defendant alleges that it left an excessive sum ($75,000) as compensatory damages. However, "[i]t is well settled that the question of excessiveness of a verdict is primarily for the trial court and its determination thereof will not be reversed on appeal except for manifest abuse of discretion." *Boston and Maine Railroad* v. *Talbert,* 360 F.2d 286, 291 (1st Cir. 1966). Defendant has shown no justification for reversal.

Defendant also asserts that the district court applied the wrong standard in setting the amount of allowable compensatory damages. The district court allowed the "maximum a jury could reasonably award." Instead, according to defendant, remittitur is appropriate only where "the maximum effect of the error can be established" and then deducted from the jury award, under *Liberty Mutual Insurance Co.* v. *Continental Casualty Co.*, 771 F.2d 579, 588 (1st Cir. 1985). *Liberty Mutual*, however, is inapposite here. In *Liberty Mutual*, a case involving only monetary loss, the trial court erred in admitting evidence of certain attorney fee expenses which did not constitute recoverable damages. There was no question that this error had inflated the jury's damage award, but the evidence was unclear as to the exact amount of the attorney fee expenses. That court, accordingly, ordered a remittitur of the maximum amount the jury reasonably could have attributed to the attorney fee expenses. The instant case, by contrast, does not involve any error in the admission of evidence as to damages. It involves, instead, a jury award for physical injuries, humiliation, and mental distress that the trial court deemed grossly excessive. The trial court indisputably applied the correct standard in ordering a remittitur of the amount in excess of what it believed to be "the maximum a jury could reasonably award." *Segal* v. *Gilbert Color Systems, Inc.*, 746 F.2d 78, 81 (1st cir. 1984).

The judgment of the district court is *affirmed*.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 86-1022.

RICHARD A. SUBATCH,
Plaintiff, Appellee,

v.

THEODORE E. HARVEY,
Defendant, Appellant.

JUDGMENT

Entered: December 23, 1986

This cause was submitted on briefs on appeal from the United States District Court for the District of Massachusetts.

Upon consideration whereof, It is here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed.

By the Court:

Francis P. Scigliano
Clerk

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 86-1022.

RICHARD A. SUBATCH,
Plaintiff, Appellee,

v.

THEODORE E. HARVEY,
Defendant, Appellant.

Before

Campbell, *Chief Judge*,
Coffin, Bownes, Breyer, Torruella, and Seyla,
Circuit Judges.

ORDER OF COURT

Entered January 27, 1987

Appellant's petition for rehearing in banc is denied.

By the Court:

Francis P. Scigliano
Clerk.